Center for Legal & Responsible Commerce

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Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: R-1217 - 2nd Advance Notice of Proposed Rulemaking Regarding Regulation Z

To Whom It May Concern:

The general theme of my comments could be described as follows, the regulations that the Board promulgates need to be unambiguous and should encourage creditors to make complete and accurate disclosures. In order to encourage complete and accurate disclosure, the Board should require estimates to be made using the least favorable assumptions (i.e., the highest interest rate, the longest repayment period, etc...). Further, while my comments are directed towards the trends I have noticed with respect to credit card companies, the comments are likely applicable to other financial industry products as well.

A growing problem that the request for comments does not address is the growing trend of credit card companies to make minimal disclosures on the credit card applications and solicitations. If the purpose of TILA is to expose the true cost of credit before the account is opened, and increase competition between creditors; the Board should require creditors to provide the entire contract with the application or solicitation, or make it available on their website. If a creditor makes the agreement available on the creditor's website, it needs to be available for review before the application is completed. One advantage to requiring the creditor provide the entire contract with the solicitation or application is that credit card issuers will have an incentive to make their credit card agreement(s) as concise and understandable as possible. Among the terms of the contract that the Board should require in or near the table required by § 12 C.F.R. 226.5a(a) are universal default and arbitration clauses. These two contractual provisions lead to the greatest problems currently facing consumers. Other disclosures that Board should require in or near the required table are the creditor's practices regarding reporting to credit reporting agencies and termination of accounts for inactivity. If the creditor is not going to report complete and accurate information regarding an account, including the actual credit limit, or is prone to closing an account that is inactive or not considered profitable enough; the Board should require creditors to inform the consumer of this before the consumer applies. The consumer's credit score is negatively impacted by the creditor's failure to report the actual credit limit and is also damaged by the creditor's unexpected closing of an account that is not in default.

As an attorney who represents consumers I have a couple of concerns that the Board must address. First is the unsolicited sending of "access devices" under Regulation E. A consumer should not have to worry about unsolicited "access devices" being sent to them; especially when the consumer informs the financial institution at the time the account is opened that they do not want the "access device." Further, it has been my experience that financial institutions often send the Personal Identification Number in the same envelope as the unsolicited "access device." Despite requiring activation from the phone number of record on the account, it has been my experience that many financial institutions will allow activation of the "access device" from other phone numbers and with minimal information such as the accountholder's birthday. Given the availability of such basic information for free on the Internet, most activation programs are easily circumvented. However, for the accountholder who has been damaged through the use of the intercepted "access device," they face a long difficult battle in order to gain the return of the money pilfered from their account. Additionally, despite a prohibition on sending combined debit/credit cards on an unsolicited basis, some major creditors have resorted to sending the unsolicited debit card, and then a few months later, adding a credit feature to the card on an unsolicited basis. Despite the fact that this is already illegal under the Regulation Z, this backdoor approach by creditors provides further justification for an absolute ban on the unsolicited sending of any "access device."

Finally, from a legislative standpoint, the Board should recommend that Congress increase the statutory damage caps on class actions based on the federal banking and lending statutes (e.g., FCRA, TILA, ECOA, FDCPA, etc...). Congress has not adjusted the cap of $500,000 since the mid-1970's, and lenders now view statutory damages as a small cost of doing business. If the Board and Congress want compliance from creditors, they need to increase the penalty to at least $2,000,000. Further, most creditors who violate the law are creating classes that usually exceed five hundred thousand in size. The $500,000 statutory damage cap leaves most class members with no compensation.

Q. 59

By definition an open-end plan is, "a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance." 15 U.S.C. § 1602(i). Even where the repayment period is fixed, but the lender allows consumers to make additional draws on the line of credit or pay the line of credit off with payments of varying amounts, disclosures should be made with respect to the finance charge incurred for each additional $1,000 borrowed at that point in the loan. The increment should change based on the amount of the line of credit. Where there is a fixed payment schedule that in cases of temporary hardship allows for a minimum payment to be made for a given month, the statement should have a disclosure on it that states, "If you make only the minimum payment this month, your new monthly bill for the remainder of the loan period will be $______." The Board should reward creditors for making the most accurate disclosures possible.

Q. 60

The Board should not exempt certain accountholders from the minimum payment disclosures for periodic statements. First, by allowing for non-uniform treatment, the cost of compliance usually increases, as do the number of lawsuits. For example, how many months does someone have to revolve a balance before they receive the disclosures? How much more than the minimum payment does the accountholder have to pay in order to be exempt from the disclosures? Further, what is the harm in informing an accountholder who usually pays in full, the cost of making only the minimum monthly payment?

Q. 61

Credit unions and retailers often couple their financing arrangements with "No Interest" or "Interest Free" for X months. Often these arrangements are really only deferring the interest, which if the full amount of the purchase is not paid during the X months of no interest, will be added on to the amount due in X + 1 months. Therefore, the Board should require creditors in these types of arrangements to disclose on the monthly statement the current amount of interest that has accumulated, and what effect making only the minimum payment would have on the interest that will be added to the principal at the end of the deferment period.

Q. 62

As already addressed briefly above, where a government agency or the creditor are providing generic examples, any assumptions made should be on worst case scenarios. This would give most creditors sufficient incentive to expend the money necessary to make accurate disclosures specific to the account.

Q. 64

Use the word "sample" or "example" combined with a footnote stating the reader should consult the terms of the account for the actual minimum payment percentage.

Q. 65

With respect to when consumers who are carrying a balance tend to make their payment each month, it is likely a safe assumption that it is at the end of the month. Except for individuals who are totally inept at managing their money, it is hard to imagine an individual paying from three to ten times the prime rate to borrow money for longer than is absolutely necessary. I agree with the assumptions made about the grace period. With respect to residual interest, the statutory examples are based on a faulty assumption that creditors are not imposing a finance charge if the account balance is less than the minimum payment. Our experience from reviewing many credit card agreements and statements leads us to believe that credit card companies charge interest if the balance is not paid in full each month and before the expiration of the grace period. Credit card companies then continue to charge interest on any balance until the accountholder has paid the account in full; with some creditors requiring two billing cycles of complete account balance payoff, before reinstating any sort of grace period.

Q. 68

Unless creditors are going to provide the actual repayment period using the creditor's actual payment formula, the Board should require creditors to provide an estimate based on the worst case scenario, and not the typical or average scenario. By allowing creditors to use a "typical" minimum payment formula, there is no incentive for creditors to make their minimum payment formulas understandable or competitive. The Board should take whatever steps are necessary to discourage creditors from providing generic estimates.

Q. 69

A significant number of creditors allow for minimum payments that do not cover the minimum finance charge. Some creditors even make it difficult for consumers to automate the payment of their credit card bills for anything other than the minimum payment or the full amount due. Negative amortization is also most likely to be a problem for those whom Congress designed the bankruptcy reform act to prevent from filing for bankruptcy. While the credit card companies and their lobbyists complain that there is no way to express the estimated repayment period where there is negative amortization, I believe two methods of disclosing the number of months for paying off the current balance could be "∞" or "Never." The latter should certainly get the point across. Whatever the Board does, it should not assume that negative amortization is not a widespread problem.

Q. 71

As discussed earlier, in order to motivate creditors to provide the most accurate information possible, any assumptions taken in arriving at the estimate should assume the worst case scenario. Therefore, if the Board is going to allow a lender to estimate, or the Board itself is going to provide the estimate, a repayment period should be calculated using the highest APR applicable to the account. Hopefully this will provide sufficient fear in the accountholder such that they will think twice before adding to their account balance or making just the minimum payment. Another advantage to having government provided estimates provide the worst case scenario is that it provides additional incentive for creditors to provide the information. This is information that creditors should be providing and not the government.

Q. 73

Having reviewed many periodic statements, sent by a variety of issuers, the majority of issuers already include a table somewhere on their statement that shows each applicable APR and the balance subject to the charge. I would suggest that the Board make such disclosures mandatory and provide a model chart for creditors to follow, since some of the statements I reviewed had the information spread out over two charts, and only some of the charts clearly stated whether the APR was fixed or variable.

Q. 76

The Board should issue model clauses because if the lending industry has demonstrated one thing, it is an unwillingness to create understandable contract language. There can be little doubt given the lending industry's opposition to any mandatory disclosure requirement regarding repayment periods, if given the opportunity, lenders will make the disclosure language so incomprehensible that the disclosure becomes meaningless. The disclosures should also be in writing whenever possible, especially given all the assumptions the ANPR points out (i.e., that there will be no new transactions, no late payments, no changes in the APRs, and that only minimum payments are made.).

Q. 77

The creditor is in an absolute position to know what the "actual" repayment period is. The creditor controls the formulas and the contract language. The calculation of how long it should take to payoff the balance as of the date they generated the statement is capable of calculation with mathematical precision; assuming no changes in APRs, no additional purchases and only minimum payments are made at the end of each billing cycle. If the creditor provides the foregoing assumptions adjacent to the actual repayment period disclosure, there should be no need for a safe harbor. If a creditor needs a safe harbor regarding the "actual" repayment period, perhaps they need to consider simplifying their formula(s).

Q. 78

If the Board is going to adopt a tolerance for error in disclosures, the tolerance should not be greater than three months. Where the repayment period is short (e.g., 60 months or less), the Board should not adopt a tolerance of more than one month.

Q. 79

I cannot speak to what information is currently available to creditors regarding actual repayment period. However, I can speak with relative certainty that adding the functionality to the software creditors currently use should not be that expensive. Lenders providing close-end loans already provide amortization tables to customers showing what they will be paying each month and the allocation of each payment between principal and interest. While credit cards are open-end products, the repayment period calculation that the statute provides for, makes the assumption that no additional transactions will occur. Thus, there is no reason creditors could not provide accurate actual repayment calculations to accountholders.

Q. 82

The Board should absolutely encourage creditors to provide the actual number of months to repay on the periodic statement. Not only would this provide consumers with something they could keep, but it would reduce costs for creditors in that they would not have to maintain an additional toll-free telephone number. It should also reduce the number of calls requiring the attention of a customer service representative. The Board should consider requiring lenders to provide additional calculation tools on their website that would allow accountholders to calculate how long it would take to payoff their account if they made more than the minimum payment. While space on the paper statement is limited, there is no reason to not use technology and the interactive functionality already built into many account management websites to enable the accountholder to better budget their repayment efforts. Additionally, if a government agency is going to collect information from creditors for use in online calculation tools, perhaps the agency could create a tool that allows accountholders to determine what effect transferring a balance from one creditor to another would have on the length of their repayment. Even if the agency is unwilling or unable to create such tools, the agency could share the information they collect with third-party websites that would be willing to develop such tools. There are already several websites dedicated to comparing credit cards and creditors that are good candidates for creating these tools.

Q. 83

There needs to be an absolute floor but there should also be a flexible standard such that the rest of the statement is not allowed to drown out the disclosure. The rule should require the equivalent of Times New Roman at 12 point typeface, or a size that is no smaller than the font and size used throughout the rest of the document. The rule must specify the font and the size because not all fonts at 12 point are equally legible at a given point size.

Q.84

The Board should consider revising the model table that the regulations already require with applications and solicitations under 12 C.F.R. § 226.5a(a). The table should include all fees applicable to the account, the percentage of accounts likely to get assigned to an APR (where multiple APRs are offered) and an abbreviated disclosure (e.g., Yes/No) for some variation of the question, "The account is subject to close or the credit limit reduced if the account is not used enough," with elaboration in the terms. The table or the area immediately adjacent to the table should include disclosure of arbitration and universal default clauses. The Board should also create a model table that shows the various APRs applicable to the account, the balance as of the statement date that is subject to each of those APRs, whether the APR is fixed, the periodic rate that the APR corresponds to, the finance charges incurred during the preceding billing period for each APR and any transaction charges associated with each APR. An example is provided below:

	Balance Subject to Finance Charges	Periodic Rate	APR	Periodic Finance Charge	Transaction Fees
Purchase APR	$	0.XXXX%	XX.XXXX% (Variable)	$	$
Cash Advance APR	$	0.XXXX%	XX.XXXX% (Fixed)	$	$
Any other APRs and their triggers (Expiration Date If Applicable)	$	0.XXXX%	XX.XXXX% (Fixed)	$	$
If you make no additional purchases on this account and only make the minimum monthly payment, assuming no changes to the terms of your account, it would take you ______ months to payoff this account.					

If the Board continues to allow creditors to include universal default and arbitration clauses, the Board should consider model clauses for each. Currently, the clauses are confusing and most accountholders are not aware of the impact each clause has on the cost of credit.

Q. 85

The minimum font size should be the equivalent of a Times New Roman at 12 point typeface, or a size that is no smaller than the font and size used throughout the rest of the statement.

Q. 88

Every document in the envelope should not need to be considered a "solicitation" because this term has additional requirements associated with it that are not necessary on each page. The rule promulgated by the Board should require each document that contains the temporary APR to prominently display the expiration date and go-to APR.

Q. 89

Given the dual requirements of "closely proximate" and "prominent location" the expiration date should be in no less than the equivalent of Times New Roman at 12 point typeface, or a size that is no smaller than the font and size used throughout the rest of the statement. Further, the disclosure should at a minimum be on the same side of the page as the first disclosure of the temporary rate, and not separated by a fold (i.e., on a typical letter sized page folded to fit into a #10 envelope, on the same third of the page as the initial disclosure.).

Q. 90

All possible rates should be listed. Further either one of the following should be provided: 1) Where the creditor has obtained sufficient information to from the pre-screen process to determine what the go-to rate will be for the solicited party, they should be required to disclose the go-to rate. 2) Where the creditor has insufficient information to give the likely go-to rate, the Board should require the creditor to disclose what percentage of those receiving the offer will be placed into each go-to rate (i.e., if the lender knows that the majority of the recipients of the solicitation are likely to receive the highest APR, then lenders should disclose that information. See my comments regarding Q. 108 *infra*.).

Q. 91

The triggers for APR increases should be in no less than the equivalent of Times New Roman at 12 point typeface, or a size that is no smaller than the font and size used throughout the rest of the statement. Further, the disclosure should be adjacent to the "Schumer Box" and preferably not separated by a fold in the page.

Q. 92-96

The disclosures required of Internet applications/solicitations should be the same if not more accurate and complete than the paper solicitations in use by the creditor. There are creditors that do not disclose in their applications and solicitations that their APRs are variable. In some instances this leads to solicitations and applications being sent to potential accountholders with APRs that have not been valid in over a year. There is no excuse for this inaccuracy on the creditor's website.

Q. 99

An accountholder's liability for a late payment fee plus finance charges should not be subject to what time the creditor receives their mail on a given day. If you think about it, the creditor's disclosure that their cutoff for payments is 2:00 p.m. is worthless, if they also do not disclose that they get their mail at 2:30. If the Board is going to continue to allow creditors to establish "reasonable" cut-off hours, the Board should require the disclosure of not only the cut-off but what time the mail is typically received. For individuals who pay online, there should also be a disclosure regarding the time of day payments are processed.

Q. 100

Yes.

Q. 108

The Board should require the disclosure of a creditor's policy of closing accounts or reducing credit limits merely because there is inactivity. While the Board does not need to define inactivity, the Board should require the creditor to disclose whatever definition the creditor adopts; creditors should include such disclosures on the application or solicitation. Further, the Board should require the disclosure of a creditor's policy of closing inactive accounts, before the consumer applies for or accepts the account because of the impact the opening and closing accounts has on an individual's credit score. Even the mere reduction of the credit limit because of inactivity should be disclosed because the reduction of the credit limit will likely reduce the potential accountholder's credit score. The required disclosure should also be more specific than, "At our discretion we may decide that you are not utilizing your account near the credit limit and therefore may reduce the credit limit without warning and for no other reason than you are not using the account enough." Under this reasoning, the Board should require the disclosure of all account terms, and the likely go-to APR for the account, where there are multiple APRs possible. Even where the creditor is not sending the application after a pre-screen of the recipient, the creditor can disclose the APR breakdown for their existing cardholders, or where there is no history, the anticipated distribution of APRs for the product. The Board should also require the disclosure of any policy of the lender which results in less than complete and accurate reporting of any account opened, as the failure to report complete information usually has a negative impact on an individual's credit score. The disclosure of the foregoing information on the application or solicitation is necessary to ensure consumers are making informed decisions about who they open accounts with.

Sincerely,

David Piell
Director
Center for Legal & Responsible Commerce